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No. 79-1040

In the Supreme Court of the United States

OCTOBER TERM, 1979

DR. JOSEPH GILBERT, PETITIONER

v.

MAX CLELAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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1. Petitioner is a medical doctor who was appointed Associate Chief of Staff for Education and Research at the Atlanta Veterans Administration Hospital in 1965 (Pet. App. E-5). Significant personal relationship problems eventually developed between petitioner and other members of the hospital staff, prompting the hospital director to relieve petitioner of his administrative duties and to seek his transfer to another facility (*id.* at E-5 to E-7). In 1970, petitioner was assigned to an inferior position in the hospital, which he refused to accept. In 1971, petitioner was ordered transferred to another VA hospital for training in general surgery, which he also refused to accept because it did not involve his specialty of cardiothoracic surgery Following his refusal to accept

the transfer, petitioner was discharged by the VA (*id.* at E-7). He then filed this action in the United States District Court for the Northern District of Georgia in April 1972. The district court found that petitioner had been entitled to a pre-discharge hearing pursuant to 38 U.S.C. 4110 and ordered that petitioner receive back pay until the date of a decision by a VA disciplinary board under Section 4110 (Pet. App. E-7 to E-9).

After more than a year of attempts to settle this matter and to assign petitioner to an appropriate position, the VA sent petitioner a letter in July 1973, containing 22 charges supporting the VA's contention that petitioner had failed to conduct effectively the research program for the Atlanta VA hospital (Pet. App. E-9 to E-11). A disciplinary board met from October to December 1973 to consider these charges (*id.* at E-11). In July 1974, the board issued its findings, concluding that petitioner had failed to conduct a research program properly because of his personality problems (*id.* at B-11 to B-12; E-11 to E-12). The board recommended "minimal disciplinary action" against petitioner and suggested that he be reassigned to another VA facility (*id.* at B-12, B-13; E-12). The VA Chief Medical Officer approved the board's findings and recommendation and transferred petitioner to the VA hospital in Birmingham, Alabama. This action was sustained by the VA Administrator in May 1975. When petitioner refused to accept this assignment, his services were terminated (*id.* at E-12).

Petitioner again sought judicial review. In a thorough opinion, the district court considered all of petitioner's challenges to the VA decision and upheld the agency's

actions. 419 F. Supp. 859 (N.D. Ga. 1976). The court of appeals affirmed (Pet. App. E-1 to E-18). 601 F. 2d 761 (5th Cir. 1979).[1]

2. The decisions of the courts below on petitioner's various claims are correct and do not require further review.

Contrary to petitioner's contention (Pet. 12-21), he was not denied due process of law by the VA's refusal to permit pre-hearing discovery of statements of certain persons interviewed by agency investigators. When petitioner requested these items prior to the hearing, the VA informed him that the disciplinary board would only consider material presented at the hearing and that any such material would be made available to petitioner at the hearing. 419 F. Supp. at 874-875. Petitioner was never prevented from personally interviewing VA employees as prospective witnesses, and he had ample opportunity for cross-examination at the hearing. 419 F. Supp. at 875-876.[2] In these circumstances, the courts below correctly concluded that due process does not require pre-administrative hearing discovery of witness statements

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[1]The appellate court reversed and remanded a part of the district court judgment that is irrelevant to the issues now before this Court (Pet. App. E-15 to E-18).

[2]Moreover, the district court noted that under VA procedures, petitioner had the right, among other things: to a letter of charges; to a response to the charges; to a hearing before a disciplinary board; to appear personally at the hearing with counsel; to call witnesses on his behalf; to question witnesses; to respond only to charges of which he was notified; and to have the board rule solely on the evidence presented. 419 F. Supp. at 876-877. In light of these procedures, both lower courts correctly found that petitioner's disciplinary board hearing met the standards of due process. 419 F. Supp. at 876-878; Pet. App. E-12. See *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976).

and that no error had been committed. 419 F. Supp. at 878; Pet. App. E-12, E-14 to E-15. See *P.S.C. Resources, Inc.* v. *NLRB*, 576 F. 2d 380, 386-387 (1st Cir. 1978); *Silverman* v. *CFTC*, 549 F. 2d 28, 33 (7th Cir. 1977); *Frilette* v. *Kimberlin*, 508 F. 2d 205, 208 (3d Cir.) (en banc), cert. denied, 421 U.S. 979 (1975).[3] See also *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 n.16, 239-242 (1978).

Petitioner also contends (Pet. 21-32) that his transfer was not authorized by 38 U.S.C. 4110, which empowers the board to recommend disciplinary action, "which shall include reprimand, suspension without pay, reduction in grade, and discharge * * *." The courts below held that the word "include" is flexible enough to comprehend a transfer—a remedy less severe than some of the disciplines specifically authorized. 419 F. Supp. at 882-883; Pet. App. E-12 to E-14. The disciplinary board's recommendation that petitioner be assigned to another facility was clearly appropriate in light of the importance of harmony in a hospital working environment. See *Stretten* v. *Wadsworth Veterans Hospital*, 537 F. 2d 361, 368 (9th Cir. 1976).[4]

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[3]The two decisions on which petitioner principally relies (Pet. 19) are distinguishable. *Ferguson* v. *Thomas*, 430 F. 2d 852 (5th Cir. 1970), as the district court properly pointed out (419 F. Supp. at 878), does not establish a rigid due process standard and must now be read in light of *Arnett* v. *Kennedy*, *supra*. In *NLRB* v. *Safway Steel Scaffolds Co.*, 383 F. 2d 273, 277 (5th Cir. 1967), the court stated that under NLRB rules, pre-hearing discovery is available but that the denial of discovery in that instance did *not* violate due process.

[4]Petitioner also claims (Pet. 30-32) that the transfer strips him of his rating as a "surgeon" in violation of 38 U.S.C. 4108(c), which prohibits withdrawal of a rating "as a medical, surgical or dental specialist" without a finding by a board of examiners that the person is "no longer qualified in his specialty." However, petitioner performed research rather than patient care duties at the Atlanta VA hospital, and the Birmingham VA facility also proposed to use him in a cardiovascular research role. See 419 F. Supp. at 863, 868; Pet. 23.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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